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## The Federal Anti-Corruption Enterprise After McDonnell-Lessons from the Symposium

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# The Federal Anti-Corruption Enterprise After *McDonnell* – Lessons from the Symposium

George D. Brown\*

### ABSTRACT

This article was presented at the *Penn State Law Review*'s Symposium, *Breach of the Public (Dis)Trust*. The article examines the potential impact of the Supreme Court's unanimous decision in *McDonnell v. United States*. The analysis first focuses on a narrow reading of *McDonnell*, treating it as part of the Court's general approach to issues of statutory construction. However, there is a possible broader reading of *McDonnell*, which has the potential to be highly significant as applied to anticorruption prosecutions, federalism concerns, and the "criminalization of politics" critique. After examining a broader view of *McDonnell*, the article delves into whether the case is indicative of broader themes in the treatment of corruption, or potential corruption, in both the electoral and governance contexts. Next the article will analyze the surprisingly small amount of academic commentary on *McDonnell*, despite media interest, as well as the initial judicial interpretations and applications of the decision. The article concludes with a review of the many helpful contributions made at the Symposium, reflecting a diversity of views about *McDonnell*. These views are an extremely helpful starting point for grappling with the decision's uncertainties.

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# I. INTRODUCTION—A BROAD OR NARROW VIEW OF *MCDONNELL*?

We have it from no less an authority than *The Washington Post* that the Supreme Court decision in *McDonnell v. United States*<sup>1</sup> “left in its wake a new definition of what constitutes public corruption . . . .”<sup>2</sup> Others have seen the decision as equally significant.<sup>3</sup> For example, at least one circuit court of appeals has stressed its impact on the federal-state prosecutorial balance.<sup>4</sup> Before the case was even decided by the lower court, lay and legal observers were touting its importance.<sup>5</sup> *McDonnell* is certainly an important decision about federal prosecution of state and local officials for public corruption. *McDonnell*'s status as the Court's latest word on corruption makes this Symposium particularly timely. There are reasons to hesitate before attributing to the case the precedential status or generative force of such landmark decisions as

1. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

2. Matt Zapotosky, Rachel Weiner & Rosalind S. Helderman, *Prosecutors Will Drop Cases Against Former Va. Governor Robert McDonnell, Wife*, WASH. POST, Sept. 8, 2016, [https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa\\_story.html?utm\\_term=.b5b64a5edbe4](https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.b5b64a5edbe4).

3. Eric Lipton & Benjamin Weiser, *Supreme Court Complicates Corruption Cases from New York to Illinois*, N.Y. TIMES, June 27, 2016, at A14; see generally Shelley Murphy, *Supreme Court's Corruption Decision Could Affect Mass. Cases*, BOS. GLOBE, July 21, 2016, <https://www.bostonglobe.com/metro/2016/07/21/supreme-court-decision-could-affect-corruption-cases-massachusetts/OE5DkfwdfLnKS2VoeuZaal/story.html>.

4. *United States v. Tavares*, 844 F.3d 46, 54, 57 (1st Cir. 2016).

5. See, e.g., Harvey Silverglate, Op-Ed, *Politics as Usual Often Isn't a Crime*, BOS. GLOBE, May 6, 2016, <https://www.bostonglobe.com/opinion/2015/05/06/politics-usual-often-isn-crime/o2NyNsC0Fq5ZCq6H6pG51K/story.html>; George Will, *Virginia's Former Governor Faces Prison Over Politics*, WASH. POST, Jan. 6, 2016, [https://www.washingtonpost.com/opinions/viriginias-former-governor-faces-prison-over-politics/201601/06/2af3ff74-b3e6-11e5-9388-466021d971de\\_story.html?utm\\_term=.8d91fa343d74](https://www.washingtonpost.com/opinions/viriginias-former-governor-faces-prison-over-politics/201601/06/2af3ff74-b3e6-11e5-9388-466021d971de_story.html?utm_term=.8d91fa343d74).

*McNally v. United States*<sup>6</sup> or *Skilling v. United States*.<sup>7</sup> *McDonnell* was a unanimous decision on official corruption. Yet the Court has been sharply divided over issues of corruption in the closely related area of campaign finance reform.<sup>8</sup> The decision is mainly focused on a narrow issue of statutory construction—the meaning of “official act” in the federal bribery statute.<sup>9</sup> Moreover, the Court indicated that *McDonnell* could possibly be retried, by a properly instructed jury, on essentially the facts presented in his original trial.<sup>10</sup>

I have taken the position elsewhere that *McDonnell* should be read narrowly, but I admit that there are portions of the decision that support a broader reading.<sup>11</sup> The Court expressed sensitivity to “significant federalism concerns” in the case.<sup>12</sup> In addition, while the opinion did not cite *Citizens United v. FEC*,<sup>13</sup> it does contain language, highly similar to the majority opinion in that case, stressing the importance of responsiveness by public officials in a representative government to the concerns of constituents.<sup>14</sup>

In this article, I explore the broad reading side: the view that *McDonnell* is highly significant both as a guidepost for federal prosecution of state and local officials for corruption, and as a broader statement about the nature of representative governance. Was the decision, for example, *Anti-Corruption’s Last Stand*?<sup>15</sup> Accordingly, my analysis will focus on the potential significance of several key aspects of *McDonnell*.

The first, statutory construction, reaches beyond the domain of anticorruption prosecutions. The case can be seen as an example of the current Court’s hostility toward broad, potentially vague, criminal statutes. Such statutes raise potential separation of powers questions, with lawmaking authority seen as delegated to, or usurped by, courts and

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6. *McNally v. United States*, 483 U.S. 350, 360 (1987) (holding that the mail fraud statute did not prohibit schemes to defraud citizens of their intangible rights to an honest and impartial government).

7. *Skilling v. United States*, 561 U.S. 358 (2010) (holding that the honest services statute only covers bribery and kickback schemes).

8. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010).

9. 18 U.S.C. § 201(a)(3) (2012). The Court in *Skilling* stated that honest service bribery would “draw[ ] content” from § 201. *Skilling*, 561 U.S. at 412.

10. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

11. George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 32, 36–37 (2017).

12. *McDonnell*, 136 S. Ct. at 2373.

13. *Citizens United*, 558 U.S. at 310.

14. *McDonnell*, 136 S. Ct. at 2372; *Citizens United*, 558 U.S. at 359.

15. See generally Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619 (2017).

prosecutors. The phenomenon has often been noted in the anticorruption field,<sup>16</sup> but it is not limited to that area. As Pratik A. Shah demonstrates, the current Court views it as a serious problem.<sup>17</sup> Others view the Court's approach to statutory construction issues as having a particularly strong bite in the anticorruption field and as helping the Court further its narrow anticorruption agenda.<sup>18</sup>

A second potentially important dimension of *McDonnell* is federalism. Federalism is a general concern of the current Court, and has been throughout its history.<sup>19</sup> However, there has been a long-running debate among academics about the federal government's role in prosecuting state and local officials for corrupt behavior.<sup>20</sup> At times, the Court has sided with those who feel the states should play the pre-eminent role in policing themselves.<sup>21</sup> At other times, the Court has seemed to accept the federal role without question, and perhaps even to endorse it.<sup>22</sup>

Finally, there is the possibility that *McDonnell* supports the "criminalization of politics" critique. The theme of this critique is that federal anticorruption efforts sometimes harm representative politics by targeting the reciprocal practices that are an indispensable part of the American political system.<sup>23</sup> The clearest endorsement of this view from a majority of the current Court is found in *Citizens United*.<sup>24</sup> As noted, *McDonnell* contains language that endorses the same view of politics as highly reciprocal and transactional.<sup>25</sup> Particularly significant is the Court's extensive citation to amicus briefs of former government officials who viewed McDonnell's conviction as a "breathtaking expansion of public corruption law [that] would likely chill . . . officials' interactions with the people they serve and thus damage their ability to effectively perform their duties."<sup>26</sup> Indeed, Jacob Eisler sees the case as

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16. See generally NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 167–71, 280–90 (6th ed. 2015).

17. Pratik A. Shah, *The Chief Justice and Statutory Construction: Holding the Government's Feet to the Fire*, 38 CARDOZO L. REV. 573 (2016).

18. See, e.g., Eisler, *supra* note 15.

19. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 48 (2005); *United States v. Morrison*, 529 U.S. 598, 648 (2000); *United States v. Lopez*, 514 U.S. 549, 575 (1995).

20. See generally Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153 (1994); but see Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L. J. 75 (2003).

21. See, e.g., *McNally v. United States*, 483 U.S. 350, 350 (1987).

22. See, e.g., *Sabri v. United States*, 541 U.S. 600, 608 (2004).

23. See, e.g., Brown, *supra* note 11, at 6–14.

24. *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010).

25. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

26. *Id.* (quoting Brief of Former Federal Officials as *Amici Curiae* in Support of Petitioner at 6, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474)).

a major step towards a unified view of democratic theory and of anticorruption efforts in all their manifestations.<sup>27</sup>

This article considers whether *McDonnell* is, in fact, a foundational decision. Part II considers the treatment of the three major themes in the amicus briefs filed in the Supreme Court. Part III deals with the actual Supreme Court decision, focusing on the extent to which the unanimous opinion should be viewed as largely limited to issues of construction of particular statutes, as opposed to an intentionally broader treatment of the issues identified above. Part IV considers the commentary that *McDonnell* has generated. Part V examines post-*McDonnell* developments in the lower courts. Part VI reviews the Symposium as a whole—both the discussion of *McDonnell* and the elaboration of larger themes.

## II. THE AMICUS ARMADA

One of the extraordinary aspects of the *McDonnell* case is the large number of groups and individuals that came forward to support the ex-Governor by filing amicus briefs with the Supreme Court on his behalf.<sup>28</sup> This outpouring of support—and the legal arguments advanced—clearly caught the attention of the Court. It also contributed to the public perception that *McDonnell* was a “big” case about politics and the perception of political corruption. The impressive list of amici includes the following: ranking federal legal officials, including “[c]ounselors to the President who have served every President of the United States since Ronald Reagan,”<sup>29</sup> and former attorneys general; over two hundred “public policy advocates and business leaders”; two groups of law professors; six former attorneys general of Virginia from both political parties; current and former members of the Virginia general assembly; former non-Virginia attorneys general; and various public interest groups and associated individuals.<sup>30</sup> These briefs provide a remarkable

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[hereinafter Brief of Former Federal Officials]). Chief Justice Roberts noted that briefs had also been filed on McDonnell’s behalf by former Virginia attorneys general and former attorneys general from states other than Virginia.

27. See generally Eisler, *supra* note 15.

28. See, e.g., Brief of Former Federal Officials, *supra* note 26; see also *infra* note 30. Indeed, a number of briefs were filed on McDonnell’s behalf when the case was argued in the Fourth Circuit. See Silverglate, *supra* note 5.

29. Brief of Former Federal Officials, *supra* note 26, at 2.

30. Amicus Brief of Former Virginia Attorneys General in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of Former Virginia Attorneys General]; *Amici Curiae* Brief of 77 Former State Attorneys General (Non-Virginia) Supporting Petitioner Robert F. McDonnell, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of Former State Attorneys General]; Brief of *Amici Curiae* Law Professors in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of

overview of what the Supreme Court might have done beyond simply overturning McDonnell's conviction.

### A. *Statutory Interpretation*

As would be expected, these briefs deal extensively with the statutory interpretation issues present in the case. Some of the analysis focuses directly on the "official acts" question, including such issues as the recipient's knowledge of the donor's intent, and the prosecution's problem of seeming to suggest that every action a governor takes is official *because* he is an official.<sup>31</sup> However, several of the briefs go beyond these points in two interesting ways. First, they argue that a narrow construction here would be consistent with the current Court's approach to broad criminal statutes. Cases such as *Bond v. United States*<sup>32</sup> and *United States v. Johnson*<sup>33</sup> link *McDonnell* to the Court's vagueness concerns about such statutes.<sup>34</sup> A second interesting aspect of the statutory construction analysis in several briefs is that they tie the issue presented to concerns of federalism and to the risk of criminalizing the political process.<sup>35</sup> For example, some amici bring in the First Amendment.<sup>36</sup> They argue that McDonnell's activities on behalf of his benefactor were a form of political speech, immune from criminal prosecution. It seems fair to say that the criminalization of politics argument helped push the Court toward a statutory construction conclusion—a narrow approach to "official acts"—that it might have reached anyway.

### B. *Federalism*

One of the advantages of an amicus brief is that the author can take liberties in advocating legal positions that the parties—constrained by the

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Law Professors]; Brief of Amici Curiae Virginia Law Professors in Support of the Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of Virginia Law Professors]; Brief for Members of the Virginia General Assembly as *Amici Curiae* in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of Virginia General Assembly].

31. See, e.g., Brief of Former Virginia Attorneys General, *supra* note 30, at 7.

32. *Bond v. United States*, 564 U.S. 211 (2011).

33. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

34. See, e.g., Brief of Virginia General Assembly, *supra* note 30, at 14–15.

35. See, e.g., Brief for Former Virginia Attorneys General, *supra* note 30, at 12–14; Brief of Amici Curiae Public Policy Advocates and Business Leaders in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), at 3–13 [hereinafter Brief of Public Policy Advocates].

36. See, e.g., Brief for Former Virginia Attorneys General, *supra* note 30, at 10–12; Brief of the American Center for Law and Justice as Amicus Curiae in Support of Petitioner at 4, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

need to win the case—might not choose to argue. Nowhere is this point more evident than in some of the *McDonnell* amicus briefs' discussions of federalism. The federalism ramifications of national prosecution of state and local officials for the ways in which they govern have long been a subject of scholarly debate.<sup>37</sup> One can certainly argue over the national advantages of “clean” government at all levels versus the advantages of letting states govern themselves, whether well or badly.<sup>38</sup> I would label such debates as largely ones of constitutional policy—the Constitution may point towards taking a certain position, but does not compel it.

What seems different about the *McDonnell* briefs is that they emphasize questions of what the Constitution requires or forbids. The first is the question of power. In its amicus brief, the U.S. Justice Foundation devotes ten pages to the proposition that “there is no Constitutional power vested in Congress to sanction state and local corruption.”<sup>39</sup> After citing longstanding precedent about “an indestructible Union composed of indestructible states,”<sup>40</sup> the brief states that “nothing could be more vital to the independence and autonomy of the 50 states than for each state to define the permissible relations, communications, and contacts between the state’s governing officials and their constituents.”<sup>41</sup> Neither the Commerce Clause nor the Guarantee Clause supplies the national government with power to affect these relations.<sup>42</sup>

Some briefs hedge their bets by apparently conceding congressional power by insisting on a clear statement to displace state law.<sup>43</sup> At times, there is a surprising emphasis on what state law says about a particular matter.<sup>44</sup> The brief of Virginia law professors suggests going beyond notions of clear statements in admittedly valid federal laws. Its treatment of state laws seems to reflect the view that the states are the ultimate source of law.<sup>45</sup> The brief may, however, stop at the intermediate position of using state law as the reference point for federal laws.<sup>46</sup>

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37. Compare Moohr, *supra* note 20, with Henning, *supra* note 20.

38. See George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 282–99 (1997) (discussing the use of state law as a source of fiduciary duties).

39. Brief *Amicus Curiae* of U.S. Justice Foundation et al. in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Brief of U.S. Justice Foundation].

40. *Id.* at 9 (citing *Texas v. White*, 74 U.S. 700, 725 (1869)).

41. *Id.*

42. *Id.* at 11–17.

43. Brief of the Virginia General Assembly, *supra* note 30, at 14.

44. Brief of Virginia Law Professors, *supra* note 30, at 3–4.

45. *Id.* at 3.

46. *Id.* at 11.



Federalism played a role in the *McDonnell* opinion, whether or not it is an integral part of the analysis. The First Circuit, in a recent political corruption case, seized upon the Court's language in emphasizing the federalism dimensions of the problem before it.<sup>47</sup> The *McDonnell* briefs give new life to the debate over federalism and corruption. Furthermore, they suggest treating it as an open question.

C. *The Amicus Briefs and the Political Process*

It is doubtful that many of McDonnell's amici would have devoted the time, effort and resources necessary to file amicus briefs with the Supreme Court if the case had involved only questions of statutory construction and federalism. What united and motivated virtually all of McDonnell's impressive and diverse group of supporters was the view that his prosecution threatened the political process. They saw the former Governor as an elected official who had extended courtesies to a constituent, acts that elected officials perform *all the time*. This sort of interaction is not only routine in a representative democracy, it is essential to such a system. The fact that McDonnell received large sums of money from someone who wanted to do business with the state either disappeared from the fact pattern, was dismissed as legal under then Virginia law, or was subtly elided with receipt of a campaign contribution. Some excerpts from the briefs may be helpful in understanding just how important this point was for the amici.

The public policy advocates and business leaders invoked the First Amendment's "guarantee of robust political participation."<sup>48</sup> They stated that prosecutions such as that of McDonnell "chill political activity."<sup>49</sup> These are people who deal with the government on a regular basis. The following quote emphasizes their direct interest: "*Amici's* longstanding relationships with public officials will be used against them with no knowable limiting principle identified in law in advance, to guide their political conduct."<sup>50</sup>

The former federal officials, approaching the matter from the other side of the table, made the same argument:

If allowed to stand, the court of appeals' breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties. The decision below subjects to potential prosecution numerous routine behaviors that have long been essential

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47. *United States v. Tavares*, 844 F.3d 46, 54–59 (1st Cir. 2016).

48. Brief of Public Policy Advocates, *supra* note 35, at 10.

49. *Id.*

50. *Id.*

to the day to day functioning of our representative government. To effectively serve, public officials must interact with the public, seeking to understand their needs, and learn about their concerns. Elected officials in particular are expected to advocate, publicize and implement the goals of the people who elected them. That is, after all, an essential part of an official's job.<sup>51</sup>

Elected state officials saw the matter the same way:

The Fourth Circuit's unprecedented broadening of the federal corruption laws is particularly concerning to Virginia's citizen legislators. Most hold full-time jobs, and while working they may receive benefits, such as meals and token gifts. For example, a delegate who is also a construction contractor may attend an annual picnic hosted by one of his company's largest subcontractors. Sometime after the event, the subcontractor's CEO may reach out to the delegate about a completely unrelated legislative matter. Again, until Governor McDonnell's prosecution, no Virginian could have foreseen that federal authorities might assign criminal liability in such a case.<sup>52</sup>

As these quotes suggest, many involved in the political process saw McDonnell's conviction as a direct threat to them. One might dismiss lofty rhetoric about saving democracy as thinly disguised self-interest. Such views, however, represent one strand of an ongoing debate over what are proper attempts by citizens to influence "their" officials, and the limits of official responsiveness.<sup>53</sup> Such questions are inherent in a representative democracy characterized by a high degree of interaction. Jacob Eisler describes the debate as between, on the one hand, delegate theory and agonist politics, and, on the other, trustee theory and civic politics.<sup>54</sup>

At the Supreme Court level, the issue has come to a head primarily in the domain of campaign finance reform. The current majority is viewed as siding against civic politics, most recently in *Citizens United v. Federal Election Commission*.<sup>55</sup> In that case, Justice Kennedy wrote that "[f]avoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors

51. Brief of Former Federal Officials, *supra* note 26, at 6.

52. Brief of Virginia General Assembly, *supra* note 30, at 10–11.

53. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1377 (2008).

54. Eisler, *supra* note 15, at 1643, 1645.

55. See generally ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014).

who support those policies.”<sup>56</sup> *McDonnell* may reflect similar views. Let us turn to the unanimous opinion in the case to gauge the impact of the amicus briefs on the issues identified earlier, and, in particular, on the political process point of access and ingratiation that lay at the heart of the former Governor’s prosecution.

### III. *MCDONNELL*—BROAD OR NARROW?

Judging by the interest in the case, fueled by the amicus briefs, *McDonnell* had the potential to be a groundbreaking decision. The Supreme Court has handed down a number of important decisions on official corruption, as opposed to the campaign finance decisions, which also frequently involve issues of corruption and tend to receive more scholarly attention.<sup>57</sup>

Major official corruption cases include *United States v. Sun-Diamond*,<sup>58</sup> *Evans v. United States*,<sup>59</sup> *McCormick v. United States*,<sup>60</sup> *McNally v. United States*,<sup>61</sup> and *Skilling v. United States*.<sup>62</sup> Although these cases mainly involve statutory construction, they can be seen as forming a corpus of anticorruption law. *McDonnell* certainly belongs among them. The question is whether the case rises to the “bombshell”<sup>63</sup> level of *Skilling* and *McNally*, each of which radically cut back on prosecutors’ use of the “honest services” concept.<sup>64</sup> Let us first consider the view that *McDonnell* is a (relatively) narrow decision.

56. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting)). Justice Kennedy also said, “[i]ngratiation and access . . . are not corruption.” *Id.* at 360.

57. See, e.g., Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 122, 126–27 (2010).

58. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999) (holding that “in order to establish a violation of [the federal gratuity statute], the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’” by that public official).

59. *Evans v. United States*, 504 U.S. 255, 290–91 (1992) (holding that “an affirmative act of inducement by a public official . . . is [not] an element of . . . extortion ‘under color of official right’ prohibited by the Hobbs Act” (quoting 18 U.S.C. § 1951)).

60. *McCormick v. United States*, 500 U.S. 257, 274 (1991) (holding that “a quid pro quo is . . . necessary for conviction under the Hobbs Act when an official receives a campaign contribution,” irrespective of if the contribution was legitimate). *McCormick* involves the electoral context, but not campaign finance regulation.

61. *McNally v. United States*, 483 U.S. 350, 358–60 (1987) (finding that the mail fraud statute did not prohibit schemes to defraud citizens of their intangible rights to an honest and impartial government).

62. *Skilling v. United States*, 561 U.S. 358, 368 (holding that the honest services statute “covers only bribery and kickback schemes”).

63. ABRAMS, *supra* note 16, at 341.

64. Prior to *McNally*, lower federal courts had developed the concept that “fraud” could include depriving citizens of the intangible right to honest services. *McNally*, 483 U.S. at 355, 358. *McNally* eliminated the concept. *Id.* at 358–60. Congress restored it,

A. *McDonnell as a Straightforward Construction of the English Language*

The core of the *McDonnell* decision is the Court's construction of 18 U.S.C. § 201(a)(3), which states as follows:

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.<sup>65</sup>

The Court attributed substantial elements of formality to all aspects of the subsection. It first considered the notion of a question, matter, cause, suit, proceeding and controversy.<sup>66</sup> The Court reasoned that the last four, "cause," "suit," "proceeding," and "controversy," suggest "a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination."<sup>67</sup> It then concluded that the terms "question" or "matter" should be judged by the (formal) context in which they appear.<sup>68</sup> The Court found the same requirement of formality in the terms "decision and action."<sup>69</sup> Under this analysis, the Court reasoned that meeting about a matter, or speaking with interested parties would not rise to the requisite level of formality.<sup>70</sup> "Instead something more is required: Section 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter or agree to do so."<sup>71</sup>

When it came to applying this construction to McDonnell's conduct, the Court saw the matter as straightforward. The range of issues on which he assisted Jonnie Williams did not rise to the level of formality required to constitute a "cause, suit, etc."<sup>72</sup> As for McDonnell's actions, setting up meetings, hosting an event, or calling another official to talk about Williams' interests could not be viewed as taking an action or making a decision. The opinion could easily have stopped here. The Court had reached the straightforward conclusion that not every interaction between a citizen and state government is a

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elevating the concept from judge-made to statutory status. *Skilling*, 561 U.S. at 405 (citing 18 U.S.C. § 1346 (2006)). In *Skilling*, the Court narrowed that statute considerably, on the ground that it presented serious vagueness issues. *Id.* at 408–09.

65. 18 U.S.C. § 201(a)(3) (2012).

66. *McDonnell v. United States*, 136 S. Ct. 2355, 2368–70 (2016).

67. *Id.* at 2368.

68. *Id.* at 2368–70.

69. *Id.* at 2370–72.

70. *Id.*

71. *Id.* at 2370.

72. *Id.* at 2369–70 (noting that in the fact pattern, there *were* questions on matters both focused and concrete).

“question, matter, etc.,” and that not every response by a state official (in this case the Governor) is a “decision” or “action.” The core of the opinion might be seen as an interpretation of the English language to reject “the Government’s boundless interpretation of the federal bribery statute.”<sup>73</sup>

If the Court had stopped at the end of what I refer to as its “core” English language statutory construction, there would essentially be only one indication that there are special rules when prosecutions of public officials, and those who deal with them, are involved: the Court’s extensive reliance on *Sun-Diamond*.<sup>74</sup> That case addressed another portion of 18 U.S.C. § 201: the so-called gratuity offense.<sup>75</sup> Section 201(c) deals with the transfer of things of value to public officials “for or because of any official act performed or to be performed by such official or person . . . .”<sup>76</sup> The Court in *Sun-Diamond* essentially transformed the gratuities offense into a form of bribery by requiring a link between the gift and the official act. The *McDonnell* Court relied on *Sun-Diamond* to bolster its narrow view of “official acts.”<sup>77</sup> *Sun-Diamond* had rejected the possibility that the term could reach so far as to embrace any action that an official took with respect to general matters pending before him in some way.<sup>78</sup> The unanimous opinion in *Sun-Diamond* can be read as showing a special solicitude for public officials facing a complex regulatory scheme. *McDonnell* may reflect the same approach.

The case limits its own reach by making clear that actual performance of an official act is not required to show § 201 bribery: “[I]t is enough that the official agree to do so.”<sup>79</sup> However, *McDonnell* was not charged under an agreement theory. The opinion could have essentially stopped here as well. Because the Court did not conclude its analysis with agreement theory, there are intimations of a broader reading and significance of the case.

*B. Constitutional Concerns in McDonnell—Federalism and a Political Process Reading of the Decision*

If the opinion had concluded at this point, *McDonnell* would stand as a straightforward, unremarkable example of statutory construction: The term “official acts” cannot extend to all the things that an official

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73. *Id.* at 2375.

74. *Id.* at 2370 (citing *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999)).

75. 18 U.S.C. § 201(c) (2012).

76. *Id.* § 201(c)(1).

77. *McDonnell*, 136 S. Ct. at 2370.

78. *Sun-Diamond*, 526 U.S. at 404–05.

79. *McDonnell*, 136 S. Ct. at 2371.

does. However, the Court did not stop with a rejection based on “text and precedent”<sup>80</sup> of the government’s “expansive interpretation”<sup>81</sup> of the term. The Court also noted “significant constitutional concerns” with the government’s position to bolster its conclusions.<sup>82</sup> However, the opinion did not specify what these concerns were. The most likely candidates are federalism and political process concerns. I will first discuss federalism issues before turning to the question of statutory construction guided by political process considerations.

In a post-*McDonnell* decision, the First Circuit Court of Appeals has cited *McDonnell* for the proposition that “the Supreme Court has warned against interpreting federal laws in a manner that . . . involves the Federal Government in setting standards of good government for local and state officials.”<sup>83</sup> *McDonnell* did, indeed, cite “significant federalism concerns.”<sup>84</sup> The strongest statement of these concerns is evidenced by the combined treatment of *McNally* and *Gregory v. Ashcroft*.<sup>85</sup> Together these cases stand for the following proposition: A state defines itself as a sovereign through “the structure of its government and the *character* of those who exercise government authority.”<sup>86</sup> The *McDonnell* Court elaborated by stating that “[t]hat includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents.”<sup>87</sup> These propositions no doubt gladden the hearts of many of the amici. At the least, the Court’s words support a federalism-based canon of narrow construction of federal anticorruption statutes. Read broadly, they lay the groundwork for a constitutional revolution: the invalidation of national attempts to regulate the “character” of those who govern the co-equal “sovereigns.”

Reading *McDonnell* as primarily a constitutional case would be a stretch because the Court never suggested that the statutes before it were unconstitutional. For example, it rejected a vagueness attack on the federal bribery statute.<sup>88</sup> In *McDonnell*’s case, the Court raised the possibility of a retrial under the very statutes at issue.<sup>89</sup> Perhaps most significant is the Court’s statement that the correct (“more limited”)

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80. *Id.* at 2372.

81. *Id.*

82. *Id.* The Court had earlier briefly referred to “constitutional concerns,” but did not elaborate. *Id.* at 2367.

83. *United States v. Tavares*, 844 F.3d 46, 54 (1st Cir. 2016) (punctuation altered).

84. *McDonnell*, 136 S. Ct. at 2372.

85. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

86. *McDonnell*, 136 S. Ct. at 2373 (emphasis added) (quoting in part *Gregory*, 501 U.S. at 460).

87. *Id.*

88. *Id.* at 2375.

89. *Id.*

interpretation of "official act" "leaves ample room for prosecuting corruption . . . ."<sup>90</sup> In other words, *McDonnell* does not change the basic institutional dynamic of the national government (in the person of United States Attorneys utilizing broad statutes) acting as the major prosecutor of state and local government corruption.

This does not mean that things will not be somewhat different post-*McDonnell*. The Court's constitutional references cannot have been asides. What *McDonnell* may stand for is that concern for the political process—with its substantial First Amendment overtones—calls for a narrow interpretation of those statutes when a prosecution under them threatens that process. In other words, of more importance than the federalism dimension is the fact that the Court blended issues of statutory construction with the question of protecting the political process. As the Court recognizes, this protection is not unlimited. Gift giving to procure official acts can extend beyond normal, protected, political interactions.<sup>91</sup> Otherwise, the possibility of a retrial for *McDonnell* would not make sense.

Although the statutory outcome in *McDonnell* was hardly a complete surprise, the Court might have simply said that "official acts" cannot mean everything an official does. *Sun-Diamond* had made it clear that "official acts" is a limited term that serves to prevent "absurdities" in the form of overly broad application to things officials do.<sup>92</sup> *McDonnell* might have amplified this reading by giving examples such as setting up a meeting or hosting an event, or it could have cited these examples and added, "because such interactions with constituents are part of the political process and have constitutional value." The latter seems the most logical reading of the Court's references to "constitutional concerns." These concerns were an important component of the rejection of the government's broad reading of "official acts." The rejection is followed immediately by the following striking paragraph:

But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign

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90. *Id.*

91. *See id.* at 2372–73.

92. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408–09 (1999).

contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.<sup>93</sup>

The Court's language reflects points made in many of the amicus briefs.<sup>94</sup> More fundamentally, it reflects a view of the political process set forth in *Citizens United*.<sup>95</sup> This striking similarity raises the question of whether the Court has imported into corruption prosecutions a view articulated, albeit by a divided Court, in the context of injunctive challenges to mainly prophylactic statutes aimed at preventing corruption.<sup>96</sup> A recent article on *McDonnell*, discussed below, by Jacob Eisler finds in the case a significant unification of the two contexts and the further development of a unified view of corruption.<sup>97</sup>

Unlike the amici, *McDonnell* does not cite *Citizens United*,<sup>98</sup> and it is hard to believe that the four justices who dissented in that case would have accepted the decision as a constitutional guide to statutory construction.<sup>99</sup> Indeed, in the "constitutional" portion of its opinion, the *McDonnell* Court backpedaled sharply, stating that neither its analysis nor, apparently, the citation to amicus briefs that accompanied it suggests "that the facts of this case typify normal political interaction between public officials and their constituents."<sup>100</sup>

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93. *McDonnell*, 136 S. Ct. at 2372.

94. See, e.g., Brief of Former Federal Officials, *supra* note 26, at 4–7; Brief for Former Virginia Attorneys General, *supra* note 30, at 6.

95. See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

96. The campaign finance statutes contain criminal provisions, but administrative enforcement through the Federal Election Commission is the norm. Pre-enforcement challenges are also frequent and important. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

97. See generally Eisler, *supra* note 15. Professor Teachout has expressed somewhat similar views. In particular, she regards *Sun-Diamond* as a significant case with extensive ramifications. She states that "it set the table for the Court's major corruption decision in *Citizens United*." TEACHOUT, *supra* note 55, at 229.

98. See, e.g., Brief of Former Federal Officials, *supra* note 26, at 8, 13, 18; Brief for Former Virginia Attorneys General, *supra* note 30, at 8; Brief of Law Professors, *supra* note 30, at 4–6, 10–14 (all citing *Citizens United*).

99. See Transcript of Oral Argument at 47, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) (Justice Breyer noting his dissent in *Citizens United*).

100. *McDonnell*, 136 S. Ct. at 2372.



IV. *McDONNELL*'S IMPLICATIONS—THE COMMENTATORS' VIEWSA. *The McDonnell Problem*

Much of anticorruption law involves interactions between public officials and their constituents. At the outset, it should be noted that many prosecutions involve non-elected officials. Because these non-elected officials do not have “constituents” in the electoral sense, their dealings with the public should not be shielded by a constitutional umbrella. Elected officials are potential beneficiaries of *McDonnell*, even when they play multiple roles as policymakers and executives. *McDonnell* will apply with particular force to cases involving quid pro quo issues. Prosecutors may now focus their attention on activities earlier in the chain of conduct.<sup>101</sup> The presence of an agreement may take on more importance, including the difficulties of proving an implicit one.<sup>102</sup> Specificity of performance—a key ingredient of any analysis based on *Sun-Diamond*—may call into question prosecutions based on a stream of benefits theory.<sup>103</sup> Issues of intent may also play a greater role. The nature of the outer boundaries of “official acts” such as a congressman writing municipal officials on congressional letterhead will be tested.<sup>104</sup>

*McDonnell* certainly will lead to a narrower, more precise judicial approach to all anticorruption statutes. As a result, United States Attorneys will likely be more careful in case selection. Defense lawyers will probably say to the anti-corruption community something on the order of “you learned to live with *Skilling*, you can learn to live with *McDonnell*.” Elsewhere in this symposium, Jennifer Ahearn also discusses a partial congressional response.<sup>105</sup>

B. *The Commentators Respond*

For a case of potentially great significance, the relative lack of law review commentary on *McDonnell* is surprising. I think the Symposium will help to rectify this situation. As of February 2017, there are two significant pieces about *McDonnell* on which focus is merited. Writing in the *Cato Supreme Court Review*, Emma Quinn-Judge and Harvey

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101. Brown, *McDonnell and the Criminalization of Politics*, *supra* note 11, at 32.

102. Prosecutors can invoke *McDonnell* to argue agreements instead of actions. However, this tactic invites the difficulties of proving an implicit agreement.

103. See George D. Brown, *Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 215–23 (2015) (discussing theory) [hereinafter *Applying Citizens United*].

104. See *United States v. Biaggi*, 853 F.2d 89, 97–99 (2d Cir. 1988).

105. See generally Jennifer Ahearn, *A Way Forward for Congress on Bribery After McDonnell*, 121 PENN ST. L. REV. 1013 (2017).

Silverglate critique *McDonnell* on the grounds that the decision did not go far enough in curbing federal prosecutions of state and local officials.<sup>106</sup> The crux of their argument is summed up in their title: *McDonnell Fails to Draw a Clear Line for Federal Prosecution of State Officials*.<sup>107</sup> Their thesis is essentially a restatement of the criminalization critique, and related arguments, coupled with a close reading of the case, which leads to the conclusion that not much has changed.<sup>108</sup>

An important element of the authors' critique is that the concept of "honest services" still drives much of federal anticorruption law, and that the Supreme Court's decision in *Skilling* did not succeed in cutting it back in a meaningful way.<sup>109</sup> *McDonnell* purported to adopt a more "bounded"<sup>110</sup> interpretation of the bribery statute, which gives "content" to honest services fraud. Quinn-Judge and Silverglate note that, since the Hobbs Act is construed as containing a bribery component, definitional issues have broad implications.<sup>111</sup> Their main point is that the definition of official act "leaves room for substantial expansion."<sup>112</sup> The authors criticize the concept of the sphere of official action as including "qualifying step[s]."<sup>113</sup> More importantly, they see a large flaw in the Court's extension of performing an official act to exerting pressure or giving advice.<sup>114</sup> Given the fact that the favors McDonnell did for Williams might seem to some as an example of such action, this criticism seems particularly strong.

The authors conclude that the "stream of benefits" theory may now be vulnerable.<sup>115</sup> However, they emphasize the possibility that lower courts will continue "the history of expansive readings of public corruption statutes . . . ."<sup>116</sup> The authors also see other post-*Skilling* problems as untouched by *McDonnell*, including the role of part-time officials, and the presence of whatever fiduciary duties federal, as opposed to state, law imposes.<sup>117</sup> The article concludes with familiar

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106. See generally Emma Quinn-Judge & Harvey A. Silverglate, *Tawdry or Corrupt? McDonnell Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2016 CATO S. CT. REV. 189 (2016).

107. *Id.*

108. See generally *id.*

109. *Id.* at 191–96.

110. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

111. Quinn-Judge & Silverglate, *supra* note 106, at 195–96.

112. *Id.* at 204.

113. *Id.* at 205.

114. *Id.* at 205–07 (citing *McDonnell*, 136 S. Ct. at 2371).

115. *Id.* at 207–08.

116. *Id.* at 208.

117. *Id.* at 209–13.

aspects of the criminalization critique, including vagueness,<sup>118</sup> prosecutorial discretion,<sup>119</sup> and federalism.<sup>120</sup> In sum, Quinn-Judge and Silverglate view *McDonnell* as a double missed opportunity: for the Court to clear up post-*Skilling* ambiguities; and for the criminalization critique to become a central theme in American anticorruption law.

Jacob Eisler's important work, *McDonnell and Anti-Corruption's Last Stand*, criticizes *McDonnell*, but from a totally different perspective.<sup>121</sup> Eisler sees the Court's holding on official corruption as demonstrating "surprising tolerance for sleazy political behavior . . ."<sup>122</sup> He argues that "[t]he Court's tolerance for self-interested representative behavior reached a high-water mark . . ." in *McDonnell*.<sup>123</sup> Eisler approaches this issue from a perspective of political ideology. He believes that representatives are obliged to discharge their roles in a public-minded manner. He favors "theories that claim that representatives should disinterestedly advance the public good in their decision-making. The trustee approach to representation asserts that representatives should advance the broader interests of the polity, rather than directly implement the desires of constituents towards whom they are partial."<sup>124</sup>

The Supreme Court's decisions on official corruption, according to Eisler, point in the opposite direction. Eisler uses the concept of quid pro quo—capable of broad or narrow applications—as the lynchpin of his analysis.<sup>125</sup> Expansive interpretations of quid pro quo will force "public officials to consider the public good."<sup>126</sup> The exact opposite happened in *McDonnell*. "By narrowing the breadth of a central concept in the corruption formula, the quo element of official conduct, and arguing that this narrowness springs from the very nature of democratic representation, the Court stakes out a minimalist position on the expectations for public integrity . . ."<sup>127</sup> The decision thus "reduces the breadth of representative behavior identified as corrupt."<sup>128</sup> For Eisler, a particularly troubling aspect of *McDonnell* is the suggestion that his "conduct *might* be acceptable political practice."<sup>129</sup>

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118. *Id.* at 214–15.

119. *Id.* at 215–17.

120. *Id.* at 216–18.

121. Eisler, *supra* note 15.

122. *Id.* at 1622.

123. *Id.*

124. *Id.* at 1645.

125. *Id.* at 1627–32.

126. *Id.* at 1632.

127. *Id.*

128. *Id.*

129. *Id.* at 1640.

The difficulty of drafting anticorruption measures is well known.<sup>130</sup> Eisler advocates for broad measures, in part to protect citizens who do not have political power, and who are at a disadvantage when those who have such power join with those who can pay for its use to their benefit. He argues, “anti-corruption statutes could be legitimately interpreted in a manner that permits broad sweep in order to encourage public-mindedness in representative behavior. In *McDonnell*, this would permit reading 18 U.S.C. § 201(a)(3) to include the conduct at issue as official action.”<sup>131</sup>

Eisler not only criticizes *McDonnell*; he sees it as the culmination of a longstanding tendency by the Court to read anticorruption statutes narrowly.<sup>132</sup> *Sun-Diamond* is the leading example.<sup>133</sup> “By illuminating the Court’s view of politics,” he reasons, “*McDonnell* suggests that judicial hostility towards civic anti-corruption is an expression of the Court’s substantive commitments rather than merely an incidental by-product of neutral application of doctrinal principles.”<sup>134</sup> Eisler notes that this pronounced tendency in official corruption law has implications for campaign finance law as well.<sup>135</sup>

Comparing Eisler’s article with that of Quinn-Judge and Silvergate is a stimulating experience. For the latter authors, *McDonnell* is neither a big case, nor one which recognizes the realities of political life. From Eisler’s perspective, it is, indeed, a big case, but one which permits the realities of political life to cross the line into what would otherwise be criminal behavior. These two articles represent the major commentary on *McDonnell* to date.

Like Quinn-Judge and Silvergate, a Comment in the *Harvard Law Review* concludes that the limits of *McDonnell* can be easily circumvented by “prosecutions based on theories of access and influence . . . .”<sup>136</sup> The Comment criticizes the Court for focusing on the quo while ignoring other statutory elements that protect against vagueness.<sup>137</sup> The Comment also criticizes the Court for ignoring what

130. See generally Lisa Kern Griffin, *Adaptation and Resiliency in Legal Systems: The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815 (2011); see also Eisler, *supra* note 15, at 1623 n.11 (discussing possible “virtue to anti-corruption laws which have a level of indeterminacy . . .”).

131. Eisler, *supra* note 15, at 1666.

132. *Id.* at 1633–34.

133. *Id.* at 1636–37.

134. *Id.* at 1639.

135. *Id.* at 1655–58.

136. Case Comment, *III. Federal Statutes and Regulations: Federal Corruption Statutes—Federal Corruption Statutes—Bribery—Definition of “Official Act”*—*McDonnell v. United States*, 130 HARV. L. REV. 467, 476 (2016). In his article on statutory construction, Pratik A. Shah, *supra* note 17, discusses *McDonnell* briefly.

137. 130 HARV. L. REV. at 474.

the author sees as the protections against arbitrary prosecutions established by *Skilling*.<sup>138</sup> Although perhaps not entirely consistent, the Comment's main thrust seems to be that, in the quest to delineate "politics from bribes[.]"<sup>139</sup> the Court has adopted a "play-to-pay rhetoric."<sup>140</sup>

A recent Note in the *Fordham Law Review* focuses on the relationship between the bribery and extortion statutes that have played a major role in federal prosecution of state and local officials, including 18 U.S.C. § 666.<sup>141</sup> The author views *McDonnell* as applying a narrow approach to quid pro quo requirements as well as to specific statutory references to "official acts."<sup>142</sup> He expresses concern that the "stream of benefits" theory may be in jeopardy because it "does not require the contemplation of a specific official action at the time the agreement is made."<sup>143</sup> On the other hand, the Note discusses the possibility that section 666 will assume a greater role.<sup>144</sup>

*McDonnell* also plays a role in Professor Deborah Hellman's excellent forthcoming article, *A Theory of Bribery*.<sup>145</sup> She sees *McDonnell* as a case that "hints at a theory of bribery and at bribery's relation to democracy, [but] offers little more than that."<sup>146</sup> A summary of her theory of bribery is that "when a public official agrees to exchange an official act for something external to the domain of politics, this exchange constitutes bribery."<sup>147</sup> Unfortunately for *McDonnell* fans, the bulk of her article is devoted to campaign finance.<sup>148</sup> Official corruption may, of course, play a larger role in later iterations.<sup>149</sup> At the end of the draft on which this analysis is based, she returns to *McDonnell*, and

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138. *Id.* at 473.

139. *Id.* at 474.

140. *Id.* at 476.

141. Adam Minchew, Note, *Who Put the Quo in Quid Pro Quo?: Why Courts Should Apply McDonnell's "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1796 (2017).

142. *Id.* at 1817–18.

143. *Id.* at 1808. For a discussion of stream of benefits generally, see *Applying Citizens United*, *supra* note 103, at 216–19.

144. *Id.* at 1824. For an early analysis of this statute and its potential growth, see George Brown, *Stealth Statute – Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 311–12 (1998).

145. Deborah Hellman, *A Theory of Bribery*, CARDOZO L. REV. (forthcoming 2017) (available on SSRN). Subsequent page citations are to an earlier version of the article, *Virginia Public Law and Legal Theory Research Paper No. 2016-47*, UNIV. OF VA. SCH. OF LAW (August 2016).

146. *Id.* at 5.

147. *Id.* at 6.

148. See, e.g., *id.* at 10–20, 34–40.

149. For a discussion of the relationship between the two areas, see generally Eisler, *supra* note 15, at 1655–58 (applying *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010)).

pinpoints the central question as “[i]s the granting of access an official act.”<sup>150</sup> Professor Hellman reads the *McDonnell* opinion as suggesting a negative answer.

## V. THE JUDICIAL REACTION TO *McDONNELL*

There is certainly widespread awareness of *McDonnell* among bench and bar, extending even to the state level.<sup>151</sup> Immediately after the case was decided, federal defendants, particularly in corruption cases, rushed to cite it.<sup>152</sup> As of March 2017, there are at least thirty citations to it in cases at various stages of litigation.<sup>153</sup> There is no doubt more to come. Many of the cases involve guilty verdicts that were handed down prior to *McDonnell* and its emphasis on jury instructions. As the courts of appeals are only beginning to play an important role, it is perhaps too early to discern any general trend or trends. However, judicial reaction suggests that while *McDonnell* will have some impact, most corruption cases will remain unaffected.

Notably, the overwhelming response of courts confronted with *McDonnell* objections is to find that the conduct in question constituted an official act.<sup>154</sup> In *United States v. Stevenson*,<sup>155</sup> the Second Circuit Court of Appeals held that a legislator’s proposing of legislation is an official act.<sup>156</sup> In *United States v. Bills*,<sup>157</sup> the District Court for the Northern District of Illinois held that *McDonnell*’s criteria were met when a city official who was a member of a selection committee voted for, and persuaded other members of the committee to vote for, a benefactor.<sup>158</sup> Some of these holdings have come despite broad jury instructions that would not survive *McDonnell*. For example, in *United States v. Fattah*,<sup>159</sup> the issue was a promise by a member of an appropriations committee to obtain an appropriation.<sup>160</sup> The United States District Court for the Eastern District of Pennsylvania described

150. Hellman, *supra* note 145, at 43.

151. *State v. Holle*, 379 P.3d 197, 207 (Ariz. 2016) (noting *McDonnell*’s rejection of broad construction of a criminal statute). For an example of *McDonnell*’s possible influence on future cases, see Dan Packel, *Feds Could Skirt McDonnell in Charges against Philly DA*, Law360, <https://www.law360.com/articles/905308/feds-could-skirt-mcdonnell-in-charges-against-philly-da> (last visited April 7, 2017).

152. Lipton & Weiser, *supra* note 3.

153. See, e.g., *United States v. Silver*, 184 F. Supp. 3d 33 (S.D.N.Y. 2016).

154. See, e.g., *United States v. Stevenson*, 660 F. App’x 4, 7 (2d Cir. 2016).

155. *United States v. Stevenson*, 660 F. App’x 4 (2d Cir. 2016).

156. See *id.* at 7, 7 n.1.

157. *United States v. Bills*, No. 1:14-cr-00135, 2016 WL 4528075 (N.D. Ill. Aug. 29, 2016).

158. *Id.* at \*3.

159. *United States v. Fattah*, No. 15-346, 2016 WL 7839022 (E.D. Pa. Oct. 20, 2016).

160. *Id.* at \*2–10.

this as a “quintessential” official act, and held that jury instructions that went beyond *McDonnell* were harmless errors.<sup>161</sup>

I believe that these cases represent the prevailing judicial trend: an accommodation with *McDonnell*, rather than a view of it as a radical change in the rules. Nonetheless, there are cases that point the other way, such as the high-profile case of former New York Assembly Speaker Sheldon Silver.<sup>162</sup> Silver backed a number of actions in favor of a benefactor, some of which clearly met *McDonnell*’s criteria, such as proposing state grants. However, he also helped the benefactor’s children get jobs, both public and private, and met with the benefactor. The quid took the form of referrals to a law firm to which Silver was of counsel.<sup>163</sup> After Silver’s conviction, the Southern District of New York granted partial post-conviction relief pending appeal. The court reasoned that the jury instructions did not track the *McDonnell* standard, and that there was “a substantial question whether, in light of *McDonnell*, the charge was in error, and if so, whether the error was harmless.”<sup>164</sup>

In August 2016, Silver appealed his conviction to the Second Circuit.<sup>165</sup> He rejected the governments allegations of quid pro quos, referring to them instead as “routine political courtesies.”<sup>166</sup> Not surprisingly, Silver’s brief relies extensively on *McDonnell*.<sup>167</sup> He stresses *McDonnell*’s view of “officials acts” as encompassing only “formal exercise[s] of governmental power.”<sup>168</sup> Silver appeared to have rendered assistance through his powerful position in state government to a doctor and to real estate developers. His argument focused on the jury instructions, which adopted a significantly broader view of official action than *McDonnell*.<sup>169</sup> According to Silver’s brief, the instruction on official action “came nowhere close to conveying the current governing law” as “*McDonnell* requires ‘a formal exercise of governmental power’ akin to a lawsuit, hearing, or agency determination.”<sup>170</sup> Silver argued that “[n]othing in the jury charge remotely conveyed that concept” and the “district court’s expansive instruction more closely resemble[d] the one *McDonnell* rejected – that ‘official acts’ include any ‘acts that a

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161. *Id.* at \*14.

162. *See* United States v. Silver, 184 F. Supp. 3d 33 (S.D.N.Y. 2016).

163. *See id.* at 38–41.

164. United States v. Silver, No. 15-CR-093, 2016 WL 4472929, at \*7 (S.D.N.Y. Aug. 25, 2016).

165. Brief for Defendant-Appellant at 1, United States v. Silver, No. 16-1615 (2d Cir. Aug. 31, 2016).

166. *Id.*

167. For example, Silver’s brief lists citations to *McDonnell* in the table of authorities as *passim*. *Id.* at iii.

168. *Id.* at 30.

169. *Id.* at 32–36.

170. *Id.* at 33 (emphasis omitted).

public official customarily performs.”<sup>171</sup> In response, the government argued that the jury instructions were sufficiently close to *McDonnell* and that the conviction should stand.<sup>172</sup> Alternatively, the government argued that any error on this issue was harmless.<sup>173</sup>

In another example of this approach, the District Court for the Eastern District of Pennsylvania described *McDonnell* as announcing “a major change in the legal landscape.”<sup>174</sup> The court released a public corruption defendant pending appeal because the jury instructions did not fit *McDonnell* and presented a substantial federal question.<sup>175</sup> The court, however, thought that any error was harmless.<sup>176</sup>

In sum, the full impact of *McDonnell* is perhaps not yet clear. In the heartland of public corruption, courts are highly sensitive to its requirements of formality and official nature. More broadly, *McDonnell* is having some impact as a statutory constitution case. In this area, however, it hardly stands alone.<sup>177</sup> At the moment, *McDonnell* looks like an important case, but hardly a revolutionary one.

## VI. LESSONS FROM THE SYMPOSIUM—THE FEDERAL ANTICORRUPTION ENTERPRISE GOING FORWARD

The Symposium offers a wide array of views about *McDonnell* and its impact. Many participants viewed the decision’s impact as highly uncertain. One can conclude that *McDonnell* probably rules out prosecutions in which the quo is only access, but its further reach is yet to be determined. As Arlo Devlin-Brown points out in the introduction, many pending cases involve *McDonnell*’s application to convictions secured before it was decided.<sup>178</sup>

The critics of the Court’s decision attacked it on both specific grounds and on broader anti-corruption considerations. As to the former, *McDonnell* was seen as possibly condoning the sale of meetings. Professor Kathleen Clark criticized the Court for not focusing enough on

171. *Id.*

172. Brief for Appellee at 27–30, *United States v. Silver*, No. 16-1615 (2d Cir. Nov. 2016).

173. *Id.* at 30–40.

174. *United States v. Vederman*, No. 15-346-2, 2016 WL 7826696, at \*3 (E.D. Pa. Dec. 21, 2016).

175. *Id.* at \*2.

176. *Id.* See also *United States v. Chin*, No. 14-10363-RGS, 2016 WL 5842271, at \*3–5 (D. Mass. Oct. 4, 2016) (citing *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (dismissing indictment on vagueness grounds)).

177. See, e.g., *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Yates v. United States*, 135 S. Ct. 1074 (2015); *Bond v. United States*, 564 U.S. 211 (2011); see generally Shah, *supra* note 17.

178. Arlo Devlin-Brown & Stephen Dee, *The Shifting Sands of Public Corruption*, 121 PENN. ST. L. REV. 979, 985 (2017).



all of section 201, particularly on its use of “corruptly.” On a broader level, Professor Clark expressed concern about the Court’s seemingly lax attitude towards corruption.<sup>179</sup>

Another important theme of the Symposium was that of federalism. Speakers viewed the Court as deeply committed to federalism values, although critics also referenced the Court’s penchant for narrow statutory construction, concerns about prosecutorial discretion, and a somewhat jaded view of access<sup>180</sup> as seen in *Citizens United*.<sup>181</sup> A possible broader role for the state emerged in the discussion of civil remedies for corruption as opposed to federal criminal prosecution.<sup>182</sup>

In sum, the Symposium explores many facets of *McDonnell*, but leaves the attendee-reader with the sense that the decision is essentially ambiguous. The majority view was probably that *McDonnell* does not portend a sea change, but is rather a lens through which many anti-corruption issues can be viewed. Accordingly, the decision’s uncertain status reflects two fundamental ambiguities inherent in the subject matter: first is federal criminal prosecution the best way to deal with a problem whose borders may extend beyond the criminal law; second, if the federal role is circumscribed, would the states play not just a larger but a different role in dealing with corruption through mechanisms that go beyond the criminal law?

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179. Kathleen Clark, Professor, Wash. Univ. School of Law, Narrowing and Distorting Our Anticorruption Laws at the Penn State Law Review Symposium: Breach of the Public (Dis)Trust: Political Corruption and Government Ethics in 2017 (Mar. 17, 2017).

180. Lance Cole et al., *Quis Custodiet Ipsos Custodes? A Panel Discussion on the Regulation of Political Corruption*, 121 PENN. ST. L. REV. 1027, 1031–33 (2017).

181. *Citizens United v. FEC*, 558 U.S. 310 (2010); Cole et al., *supra* note 182, at 1041.

182. Cole et al., *supra* note 182, at 1035